Supreme Court of the United States

OCTOBER TERM, 1941

LEWIS J. VALENTINE, individually and as Police Commissioner of The City of New York,
Petitioner,
against
F. J. CHRESTENSEN,
Respondent.
No. 707

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT

March 5, 1942.

WALTER W. LAND,
Attorney for Respondent.

WINTHROP, STIMSON, PUTNAM & ROBERTS,
Of Counsel.

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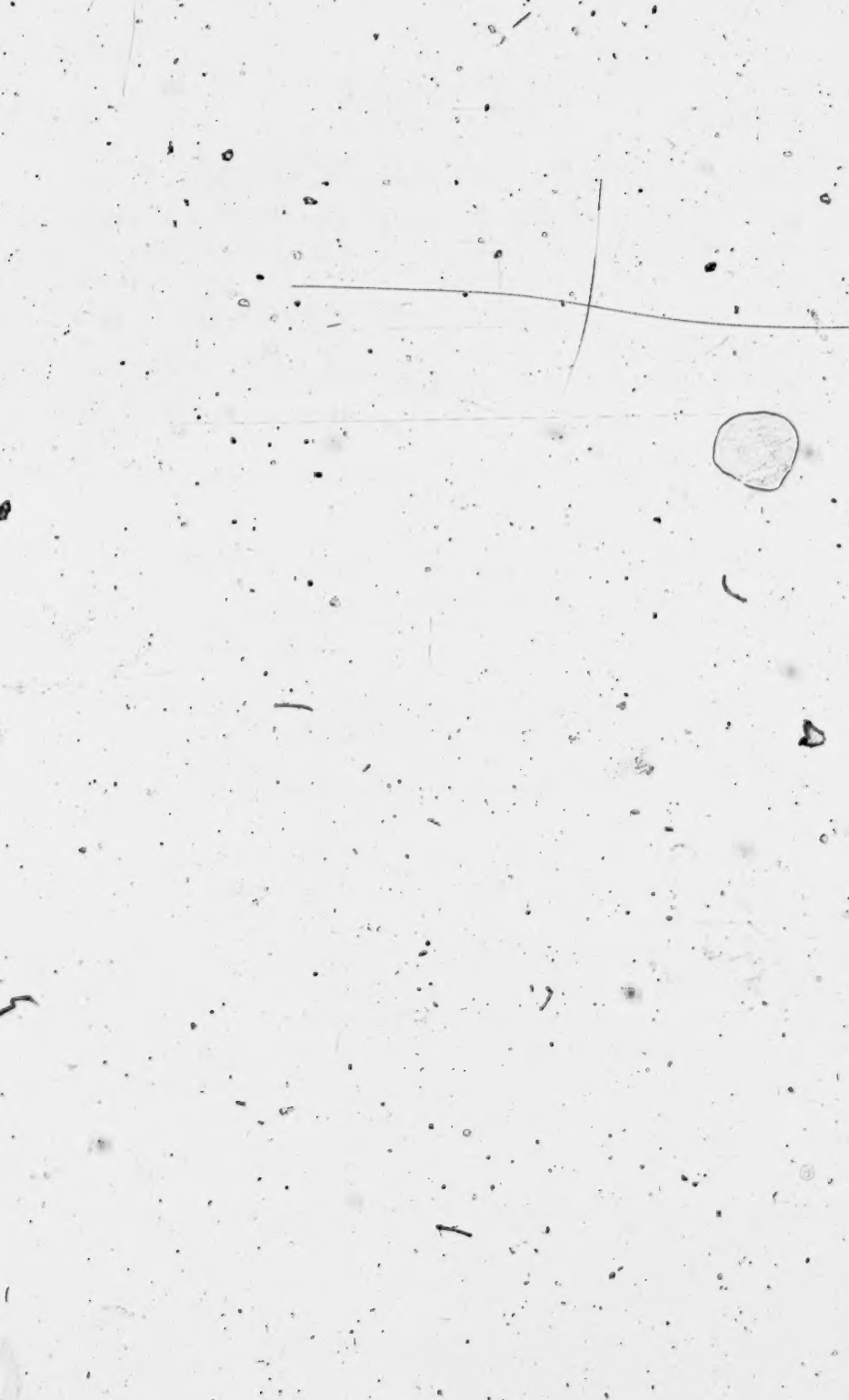

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Statement of Facts

The respondent, F. J. Chrestensen, is the owner and exhibitor of former United States Navy Submarine S-49. He brought this submarine to New York City in the summer of 1940 for exhibition. The Commissioner of Docks of New York City refused to rent to respondent docking facilities at any municipal docks and he was therefore compelled to rent less desirable docking facilities from the State of New York at Pier 5 in the East River.

Respondent then had printed a handbill advertising the submarine (Deft. Exh. 1; R., 18C), which handbill is hereinafter referred to as "handbill No. 1". He was, however, informed by the New York City Police authorities that the distribution of handbill No. 1 on the public streets of New York City would violate sec. 318 of its Sanitary Code, but that he could freely distribute handbills containing "information or a public protest" (R., 17).

Respondent thereupon followed the suggestion of the police authorities, as he understood it, and had printed a second handbill, which is hereinafter referred to as "handbill A". (Pltf. Exh. A; R., 18A-18B). Handbill A was printed on both sides. One side contained a protest against the dictatorial conduct of the Commissioner of Docks of New York City in refusing to rent to respondent any city owned docks at Battery Park or Pier 1A.

The opposite side of handbill A contained a diagram showing the location of the submarine, a picture of the submarine and certain information concerning the submarine which, respondent's experience had shown, the general public was interested in knowing. Respondent removed from the handbill all data which he felt could be considered as advertising. All references to the sale of tickets were removed. The statement "Popular Prices, adults 25¢, children 15¢" disappeared. All reference to guide service was deleted. The insistent demands to "See" the described points of interest were replaced by the simple informative statement that "Submarine S-49 contains" a torpedo compartment, sleeping quarters, etc.; and the invitation to see how men live in a hell diver vanished completely.

Respondent then took handbill A to the police authorities for their approval. This time he was told that the distribution of handbill A would be restrained but that he could freely distribute a handbill containing the protest, but not the data appearing on the opposite side (R., 17-18). Respondent, believing that the police authorities were acting arbitrarily, then consulted counsel as to his rights and instituted suit in the United States Courts for relief.

The only handbill involved in this case is handbill A and respondent acted in absolute good faith in preparing it in accordance with the suggestion, as he understood it, made to him by the police authorities that he could freely distribute handbills containing only information and public protest. Petitioner's insinuations now that the protest was added gratuitously as a device to circumvent the city ordinance are, therefore, highly resented by respondent. The

reason he did not come back with a third handbill is because he felt that no matter how many handbills he had printed the police authorities would still refuse permission to distribute them.

The Opinions of the Courts Below

Respondent instituted suit in the United States District Court for the Southern District of New York to perpetually enjoin petitioner from interfering with the distribution of handbill A (Pltf. Exh. A; R., 18A-18B) to persons willing to receive the same on the public streets and sidewalks in The City of New York and at the same time respondent made a motion for an injunction *pendente lite*. Jurisdiction is founded upon diversity of citizenship of the parties, there being more than $3,000 involved, and also upon the deprivation of constitutional rights. 28 U. S. C. A. sec. 41 (1) and (14). The District Court granted respondent's motion for an injunction *pendente lite* and held the handbill ordinance, Sec. 318 of the Sanitary Code of The City of New York (R., 16) unconstitutional and invalid on its face. The Court's decision is reported in 34 Fed. Supp. 596 (1940) and is reprinted as an appendix to petitioner's brief. It was thereupon pointed out to the District Court by the petitioner that this decision went beyond the scope of the present case and accordingly upon the final submission, the final decree (R., 9-10) granting a permanent injunction was narrowed to the facts of the case and the handbill regulation was held unconstitutional as applied to handbill A.

On appeal to the Circuit Court of Appeals, that Court affirmed the District Court (R., 21-32). Clark, Cir. J. (with whom Swan, Cir. J. concurred), wrote the prevailing opinion in which it was held that the handbill ordinance was unconstitutional as applied to handbill A, containing a combination of protest and advertisement. Frank, Cir. J., wrote a dissenting opinion (R., 32-51). 122 F. (2d) 511.

Issue Presented

The primary question presented is whether section 318 of the Sanitary Code of The City of New York is unconstitutional as applied to handbill A, in absolutely prohibiting as distinguished from reasonably regulating the distribution of a handbill containing in part a protest against the action of the Commissioner of Docks and in part information about a submarine and advertising.

POINT I

Section 318 of the Sanitary Code of The City of New York is invalid and unconstitutional as applied to handbill A because it unlawfully discriminates between commercial and non-commercial advertising handbills.

(1)

The City of New York has had in force ordinances prohibiting the distribution of handbills since approximately the beginning of the present century. Prior to 1938, however, this series of ordinances contained no express distinction between commercial and non-commercial handbills. In 1938, at about the time of this Court's decision in *Lovell v. City of Griffin*, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949, the ordinance was transmuted into the present health department regulation, sec. 318 of the Sanitary Code, and the important final sentence was added for the first time: "This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter."

Petitioner concedes that without a limitation such as this last sentence affords the ordinance would clearly be invalid and unconstitutional in view of this Court's decisions since 1938 (Petitioner's brief, p. 27, footnote).

The avowed purpose of the handbill ordinance is to protect the public health by preventing the littering of the streets. Petitioner divides handbills and circulars into three classes: (a) non-commercial literature, (b) non-commercial advertisements, and (c) commercial advertisements. He admits it is no longer possible to absolutely prohibit the distribution of handbills containing non-commercial literature and he concedes that he may no longer suppress non-commerical advertisements (Petitioner's brief, p. 6). It is only commercial advertisements which petitioner seeks to ban. We contend, on the contrary, that handbills containing commerical advertisements may be reasonably regulated but not prohibited.

In *Lovell* v. *City of Griffin*, supra, this Court, through Mr. Chief Justice Hughes, intimated that ordinances which reasonably regulated the distribution of handbills to prevent the misuse or littering of the streets would be sustained, and no distinction was made as to the nature of the handbill, so presumably all types of handbills could be reasonably regulated (303 U. S. 441, 451). If the City of New York, therefore, is sincere that the purpose of the ordinance is to prevent street littering, it should have enacted a new ordinance in 1938 placing reasonable regulations upon the distribution of all handbills, commercial and non-commercial, so that no littering at all would result.

Instead of enacting such a regulation, however, the City of New York in 1938 attempted to patch up its former ordinance by adding the final sentence making clear that only commercial and business advertising matter was prohibited.

Petitioner has, we submit, thus caused himself to be maneuvered into the untenable position where he must admit that under the patched-up present city ordinance, handbills containing non-commercial advertisements may be distributed without restraint, regardless of how much the streets are littered; but that commercial handbills may not be distributed at all, even though no littering would result from their distribution. This, we submit, constitutes an unlawful discrimination.

Petitioner, in order to win this case, must sustain his proposition that a valid distinction can be drawn between non-commercial advertisements and commercial advertisements and that commercial advertisements can be absolutely prohibited. He admits (Petitioner's brief, p. 12) that unless he can uphold that distinction his other points are futile. He has attempted to make this distinction between commercial advertising and other advertising before—and has failed.

In *Walters* v. *Valentine*, 172 Misc. 264, 12 N. Y. S. (2d) 612 (Sup. Ct., N. Y. Co. 1939) a regulation was before the court which prohibited advertising by sandwich men but excepted pickets. Justice McCook refused to follow the City's attempt to distinguish between commercial and non-commercial advertising and held the regulation invalid and advised the Corporation Counsel that the reasonable regulation of both sandwich men and pickets was the solution to the problem.

Similarly the petitioner urged before the United States District Court and the Circuit Court of Appeals in the case at bar that a distinction should be made between commercial advertising and other advertising, but both Judge Hulbert and Judge Clark declined to follow this point and both courts pointed out that non-commercial handbills result in just as much, or more, littering than commercial handbills.*

Petitioner has stated (Petitioner's brief, p. 27, footnote) that he has been unable to find any decision which has invalidated an ordinance that only prohibited the distribution of commercial advertisements. We wish to call the Court's attention to a very significant decision of an Oregon court which is exactly in point on this question. This is the case of *Loycar* v. *City of Portland*, decided by Judge Brand of

* *People* v. *LaRollo*, 24 N. Y. S. (2d) 350 (Mag. Ct., N. Y. City, 1940) on which petitioner relies as his only decision holding that commercial handbills may be banned, was a decision he obtained in the New York City Magistrate's Court after Judge Hulbert had held the ordinance invalid on its face and had granted a temporary injunction against its enforcement.

the Circuit Court of Oregon, County of Multnomah, on September 23, 1940, almost simultaneously with the decision of the United States District Court in the case at bar. The decision is unreported so far as we can ascertain and for that reason is quoted herein more fully than would otherwise be done. In a 39 page opinion which carefully considered the problem of commercial advertising circulars, it was held that the ordinance of the City of Portland, Oregon was unconstitutional. A straight commercial circular, advertising a garage and auto motor service, was involved and had been distributed on the streets of Portland in violation of the ordinance which absolutely prohibited the distribution of "any advertising matter upon the streets or public places of the City of Portland."

Upon the urging of the City Attorney that this ordinance applied only to commercial advertising circulars Judge Brand stated: "I shall assume, without now deciding, that the Portland ordinance may be so construed as to apply only to commercial advertising of commercial products." Later in the opinion he set forth the reasons why it seemed clear that the City's position was correct that the ordinance was aimed only at commercial advertising matter. He then phrased the issue as follows: "Our inquiry relates to the asserted power to absolutely prohibit commercial street advertisements of harmless goods and useful services."

In holding that the distribution of commercial advertising handbills could be reasonably regulated but that an ordinance absolutely prohibiting their distribution to persons willing to receive the handbills was unconstitutional, Judge Brand stated:

> "While the preservation of free speech upon industrial and political matters is of essential importance, and the rights of minorities must always be maintained, still it appears to me that the simple interests of the great body of manufacturers, retailers, farmers, artisans, and laborers who constitute the heart of democratic America, and perhaps the majority of its people, are equally im-

portant. Such simple interests of people to make known to the world their commercial desires, whether to buy, sell or serve, should receive essentially similar constitutional treatment to the extent that they should not be placed by Judicial action in an inferior position as persons under the bill of rights.

"In my opinion, having regard to the leaflet cases, [of the United States Supreme Court] the court must hold that there is a constitutional right on the part of commercial advertisers to deliver literature upon the public streets to persons willing to receive it. The expense and inconvenience involved in removing discarded leaflets from streets does not involve such present danger to the peace, health or safety of the state as would warrant the abridging of the individual liberties of the citizen. In so holding we are but applying the mandate to 'weigh the circumstances and appraise the substantiality of the reasons advanced in support of the regulation.'

"What has been said must not be taken as suggesting in any way that the constitutional right of commercial advertising on the streets is not subject to broad regulation by the legislative arm under the police power. I have merely indicated that the specific constitutional right established in the leaflet cases to deliver literature containing information or opinion to persons on the street *who are willing to receive the same* extends to and includes commercial advertisers."

* * * *

"Since all others have the constitutional right to distribute literature on the streets to persons who are willing to receive it, I am of the opinion that the same constitutional right must be accorded to commercial advertisers. They may deliver commercial advertising, therefore, to persons on the streets who are willing to receive the same and who, if they do receive such literature, may well be held responsible for deliberately littering the streets thereafter. In my opinion, such a conclusion is enforced, first, by the authority of the leaflet cases, and, second, by the rejection of the proposed doctrine of constitutional zones of sanctity."

Here, then, is a decision squarely in point holding that an ordinance which only prohibited the distribution of commercial advertising handbills is unconstitutional. We respectfully submit that the reasoning of Judge Brand should be sustained by this Court and that his decision is in keeping with this Court's decisions in the leaflet cases.

In *Lovell* v. *City of Griffin*, supra, Mr. Chief Justice Hughes said (303 U. S. at 451, 452):

> "The ordinance is not limited to 'literature' that is obscene or offensive to public morals or that advocates unlawful conduct. There is no suggestion that the pamphlet and magazine distributed in the instant case were of that character. The ordinance embraces 'literature' in the widest sense.
>
> "The ordinance is comprehensive with respect to the method of distribution. It covers every sort of circulation 'either by hand or otherwise.' There is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets. The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the city manager.
>
> "We think that the ordinance is invalid on its face."
>
> * * * * *
>
> "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."

This Court in the *Lovell* case did not deny a municipality the right to regulate the distribution of handbills. On the contrary, it indicated that the distribution of pamphlets might be regulated in various ways. In listing the types of restrictions which could lawfully be imposed upon the distribution of circulars, however, no distinction was made between commercial and non-commercial circulars.

In 1939, this Court held the Jersey City, New Jersey ordinance unconstitutional in *Hague* v. *C. I. O.*, 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423. In an action to enjoin, among other things, interference with the distribution of labor union circulars and handbills Mr. Justice Roberts, writing for the Court said: "The ordinance absolutely prohibiting such distribution is void under our decision in *Lovell* v. *City of Griffin*, supra, and petitioners so concede." 307 U. S., at 518. Based upon this Court's decision, the final decree upon mandate of the United States District Court for the District of New Jersey, dated June 19, 1940, in the *Hague* case, restrained the officials of Jersey City, New Jersey, from enforcing against the plaintiffs the provisions of their ordinance as to (1) the distribution of circulars, (2) the sale of labor union literature, "whether for profit or otherwise", and (3) the displaying of placards or signs.

Of the four cases this Court reviewed in *Schneider* v. *State (Town of Irvington)*, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155, the case of *Kim Young* v. *California*, 33 Cal. App. (2d) 747, 85 P. (2d) 231 comes the closest to the facts of the case at bar. The handbill involved in that case advertised a meeting under the auspices of "Friends Lincoln Brigade" at which the War in Spain was to be discussed. The handbills contained the words "Admission 25¢ and 50¢". This Court, through Mr. Justice Roberts (308 U. S. at 155, n. 3) stated as to this:

> "On the hand-bill were the words 'Admission 25¢ and 50¢.' The Superior Court adverted to these and said: 'Whatever traffic in ideas the Friends Lincoln Brigade may have planned for the meeting, the cards themselves seem to fall within the classification of commercial advertising rather than the expression of one's views. But if this be so, our conclusion is not thereby changed.' "

On the appeal before this Court in *Kim Young* v. *California*, one of the three points in the brief of appellee, California, was devoted exclusively to the argument that the handbill

in question was a commercial advertisement, and that therefore the constitutional guarantees did not apply. In fact that brief contained many of the same arguments now urged by petitioner. None the less, this Court, in holding the California ordinance invalid, made no distinction between commercial and non-commercial "information or opinion" which may be distributed in the form of handbills. If this Court desired to exclude commercial street advertising, delivered to one willing to receive it, from constitutional protection, a few words would have indicated that desire.

People v. *Taylor*, 33 Cal. App. (2d) 760, 85 P. (2d) 978, decided after *Lovell* v. *City of Griffin*, supra, is just like the case at bar in that it also dealt with a handbill containing a combination of commercial advertising and non-commercial data. The ordinance was held invalid for violating freedom of speech and press. Petitioner attempts to distinguish this case (Petitioner's brief, p. 34, footnote) on the ground that it was devoted mainly to political discussion although containing an advertisement of a bookstore, and that since it was not distributed *primarily* for commercial advertising purposes, its distribution should be permitted. We wish to point out that the handbill in that case, in addition to the commercial advertisement of the book store, also contained a commercial advertisement of a daily paper, Peoples World, together with a schedule of its subscription rates, and a commercial advertisement of several pamphlets and of some ten books with the prices of each and a laudatory descriptive paragraph of each. The court characterized the circular as a "publication of a radical but not incendiary nature, mainly devoted to political discussion but containing certain ad-advertising matter." The court held without equivocation that an ordinance absolutely prohibiting the distribution of advertising matter was unconstitutional. After stating that the city could inhibit the defacing of property, the court expressed its condemnation of the ordinance as follows:

> "This, however, is not the portion of the San Diego ordinance under which the charge before us is

> laid. What is charged is a mere personal distribution of advertising matter to pedestrians on a public street and to persons in another public place. There is no charge that such matter was forced upon persons not willing to receive the same or that there was anything in the distribution tending to disturb the peace or public order or to cause any littering of the streets or of any public place. The attempt to prohibit the mere handing of advertising matter to persons on the streets or in other public places has often been held to be an unlawful and unwarranted invasion of private rights and therefore to be beyond any legitimate exercise of the police power, and we are in accord with that view. People *v.* Armstrong, 73 Mich. 288, 41 N. W. 275, 2 L. R. A. 721, 16 Am. St. Rep. 578; Chicago *v.* Schultz, 341 Ill. 208, 173 N. E. 276; People *v.* Johnson, 117 Misc. 133, 191 N. Y. S. 750; Ex parte Pierce, 127 Tex. Cr. R. 35, 75 S. W. 2d 264. See also Lovell *v.* Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949.'

We submit, therefore, that the conclusions reached by Judge Hulbert and Judge Clark below and by the courts in *Loyear* v. *City of Portland*, supra, and *People* v. *Taylor*, supra, are sound, that they are consistent with the handbill decisions of this court, and that this court should confirm that the distribution of commercial advertising handbills may be reasonably regulated but not absolutely prohibited.*

Where, then, does petitioner's position leave him? He is forced to concede that the distribution of non-commercial literature can not be prohibited. He admits that since 1938 he can no longer absolutely prohibit the distribution of non-commercial advertising. Reluctantly, he even takes the last

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* A number of cases in the past have held city ordinances invalid which absolutely prohibited the distribution of handbills as distinguished from reasonably regulating them. *People* v. *Armstrong*, 73 Mich. 288, 41 N. W. 275; *City of Chicago* v. *Schultz*, 341 Ill. 208, 173 N. E. 276; *Ex Parte Pierce*, 127 Tex. Crim. App. 35. See also *People* v. *Banks*, 168 Misc. 515, 6 N. Y. S. (2d) 41; *People* v. *Finkelstein*, 170 Misc. 188, 9 N. Y. S. (2d) 941. For other authorities suggesting that regulation is the solution, see 28 Geo. L. J. 649; 8 Geo. Wash. L. Rev. 866, 868; 53 Harv. L. Rev. 487, 488.

step and agrees that circulars containing commercial advertising may not be absolutely prohibited, provided the circular is not distributed primarily for commercial advertising purposes. Instead of stubbornly trying to hold on to a patched-up city ordinance, why does he not have enacted a new handbill ordinance in keeping with the recent decisions of this court and make reasonable regulations for all handbill distribution. That is the real way to prevent littering of the streets, instead of singling out one indefinite type of handbill and absolutely prohibiting its distribution while permitting the streets to be littered by all other handbills.

(2)

Furthermore, petitioner's attempted separation of handbills into the classes of commercial advertising and non-commercial advertising is based upon unreality and is most impracticable. In the trial before the Circuit Court of Appeals, petitioner took the position that in the case of a handbill containing a combination of commercial and non-commercial data, if it is distributed primarily for commercial advertising purposes, it is to be treated as a commercial advertisement.

The unsatisfactory nature of such a test was forcefully pointed out by Judge Clark (R., 30-32) when he asked "How much is 'primarily'?" and showed that the net result of such a rule would be to make the police officers the arbiters, which would be most unfortunate. Respondent's handbill was used by Judge Clark as a good example of the uncertainty of the suggested distinction. If words were counted, more words are devoted to the protest than to the rest of the handbill; spacing and display give at least equal place to the protest. Suppose in the case of *Kim Young* v. *California*, supra, the speakers "Back from War-torn Spain" were being compensated out of the "Admission 25¢ and 50¢", would the financial remuneration they received make the meeting commercial? Actually the Superior Court characterized the circulars as commercial while petitioner urges they should be classified as non-commercial.

Why could not newspapers themselves be prohibited by a municipality if the officials in power did not like a paper's criticism? Certainly newspapers are primarily commercial enterprises and their owners operate them to make a profit. We mention these illustrations to indicate the extremely difficult problem which the courts would face of distinguishing between commercial and non-commercial circulars if it were held that commercial advertising handbills could be absolutely prohibited. Judge Brand referred to this question in *Loyear* v. *City of Portland*, supra, and said:

> "I pass without comment the profoundly difficult matter of distinguishing between commercial advertising and other forms of information and opinion, but it appears clear that in infinitely varying degrees commercial advertising may approach the dissemination of information of great social importance concerning discoveries, modern techniques and the like. To draw the line would involve a difficult and delicate judicial process."

Moreover, there is no constitutional justification for petitioner's classification of advertising into commercial and non-commercial advertising. The alleged distinction between so-called property rights and so-called personal rights is a superficial play on words. Property rights are not limited to inanimate matter, as land and chattels. The most sacred rights of merchant, mechanic, and farmer, of master and servant, are, when analyzed, personal rights of individuals and most of them relate to their interest in securing for themselves some form of property. This is well illustrated by the dissemination of information by employer and employees. The employee may publicize the unfairness of an employer under the aegis of free speech, but his purpose in doing so is to gain more property for himself. Yet no one calls the right to picket a property right. The same motive actuates the small business man. All that we ask for is that he have the right to advertise on a par with the employee, that he may secure the benefits of more business or even employment for himself. For the

courts to lay down a rule, through the power to define freedom of speech and press, so that one group has the inherent right to distribute leaflets on the street to persons willing to receive them, while another group is declared subject to unqualified prohibition at the option of any municipality or state, would, we submit, be a most unwise course.

We accordingly urge that no distinction should be made between so-called commercial advertising and non-commercial advertising.

POINT II

Section 318 of the Sanitary Code is invalid because it unreasonably prohibits the distribution of commercial handbills, whereas littering can be prevented by other and lawful means.

The avowed purpose of the handbill ordinance is to prevent the littering of public streets and sidewalks. We have no quarrel with that objective. The truth of the matter is that if the suggestion of this Court were followed by The City of New York and a handbill ordinance enacted which regulated the distribution of all handbills, there would not even be the littering which exists at the present time from the unrestrained distribution of all non-commercial handbills.

Petitioner has now dropped the suggestion he made before the District Court and the Circuit Court of Appeals that commercial advertising handbills were more apt to be cast away than non-commercial handbills (See Judge Clark's comment on this. R., 24, footnote 1). In *City of Milwaukee* v. *Kassen*, 203 Wis. 383, 385, 234 N. W. 352, 353, the court stated: "nor is it true that commercial advertising in the form of a dodger or handbill is more likely to be thrown to the street and result in its being littered than handbills or dodgers containing political or economic propaganda." Petitioner now admits (Petitioner's brief, p. 22) that non-commercial handbills are as obnoxious in

respect of littering the streets as are commercial handbills. But, he adds, the littering that results from non-commercial handbills is something that must be patiently borne by a municipality. A reading of this Court's recent handbill decisions would inform petitioner that he does not have to tolerate littering from any kind of handbills and we submit that the way to prevent littering is to regulate all handbills.

In *Lovell* v. *City of Griffin*, supra, Mr. Chief Justice Hughes intimated that an ordinance which prohibited the misuse or littering of the streets would be sustained. In *Schneider* v. *State*, supra, Mr. Justice Roberts pointed out the way that municipalities could prevent littering of the streets when he stated:

> "This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets."

For a case which upheld as valid and reasonable a city ordinance which merely prohibited the *casting* of handbills to the street, see *City of Philadelphia* v. *Brabender*, 201 Pa. 574, 51 Atl. 374. A note in 29 Geo. L. J. 660, 662, commenting on Judge Hulbert's decision below and the recent handbill decisions of this Court, states that municipalities must now act directly upon those who throw handbills into the streets and in that way prevent littering.

A Municipal ordinance may of course prohibit literature of an obscene or immoral nature and literature that would tend to incite public disorder. It might also properly provide, we believe, that handbills distributed on the streets should be given only to those persons who willingly received them. Furthermore, we would have no quarrell with an ordinance which provided that the distribution of handbills on a public street must not result in a littering of the street and that if by chance handbills were cast away, the distributor must clean them up.

We concede, therefore, that a municipality may make reasonable regulations concerning the use of public streets, sidewalks and other public places. Dillon, Municipal Corporations (5th Ed.) sec. 589. Ordinances and regulations, however, which are discriminatory or unreasonable are invalid and accordingly whatever regulatory measure is adopted must be reasonable and not drafted in such a way as to make it impossible for the small business man to comply with it, because in that event it would merely be a subterfuge for an outright prohibitory ordinance. Furthermore, it is established law that the determination of what, in any specific instance, is a proper and reasonable exercise of the police power is within the province of the courts. *Lawton* v. *Steele*, 152 U. S. 133, 137, 14 S. Ct. 499, 38 L. Ed. 385.

It is submitted that the handbill regulation involved in the instant case is unconstitutional because it does not reasonably regulate the distribution of handbills but absolutely prohibits their distribution. Petitioner seems to fear that, to hold this handbill regulation invalid would result in New York City being flooded with handbills. Any such fear is, we believe, entirely groundless. This Court has suggested that an ordinance may prohibit the casting of handbills to the street, and New York City is well equipped with receptacles for waste paper so it would cause the public no unreasonable inconvenience to enforce such a provision. If the ordinance in addition prohibited the littering of the streets, and directed that circulars should be handed only to those persons who willingly receive them, and required the distributor of handbills to have someone present to pick up any that were cast away, it is submitted that the objective of the city to keep its streets clean would be accomplished, and accomplished in a constitutional manner.

In the instant case, respondent was absolutely prohibited from distributing handbill A. An examination of the handbill will show that it is a perfectly harmless circular and contained nothing of an obscene or immoral nature, nor is it incendiary so as to be apt to cause a public disorder. It is merely a spirited protest against the conduct of the Commissioner of Docks, and information about the submarine:

Respondent had planned to have someone with each person distributing handbill A to pick up any circulars cast away but he was not even given an opportunity to demonstrate that no littering would result and that the handbills would be handed only to those persons who willingly received them so that there would be no molestation of the public.

As the patched-up ordinance is now phrased, the handing of one card by one person to another person, willing to receive it, at 4 A. M. in the morning on a vacant street would be prohibited and the distributor would be liable to arrest and punishment. An ordinance so phrased is clearly unreasonable and unconstitutional and its enforcement should be enjoined. The conclusion reached by Judge Clark (R., 28) is, we submit, the correct one, namely: "Absolute prohibition of expression 'in the market place' is illegal, not to be saved by any commercial taint attached to the expression."

POINT III

Section 318 of the Sanitary Code is invalid in that it is discriminatory against the small business man and deprives respondent of property without due process of law.

The conduct of his business by respondent is a lawful enterprise and this Court has frequently held that it is beyond the police power of the states to interfere arbitrarily with a lawful business. *Meyer v. Nebraska*, 262 U. S. 390, 400 (1923); *Liggett Co.* v. *Baldridge*, 278 U. S. 105, 111 (1928); *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589 (1897). Even the small business man has some rights and it is still the law of the land that

> "a regulation which has the effect of denying or unreasonably curtailing the common law right to engage in a lawful private business such as that under review cannot be upheld consistent with the 14th amendment. Under that amendment, nothing is

more clearly settled than that it is beyond the power of a state, under the guise of protecting the public, arbitrarily (to) interfere with private business or prohibit lawful occupations or impose unreasonable or unnecessary restrictions upon them."

New State Ice Co. v. *Liebmann* 285 U. S. 262, 278, 76 L. Ed. 747, 754;

J. Burns Baking Co. v. *Bryan*, 264 U. S. 504, 513, 68 L. Ed. 813, 826.

(1)

Under the language of the present patched-up regulation, only the business man is discriminated against. If a labor union organizer distributes handbills advertising a labor meeting, that is permitted—even though such organizer makes a living from such activity. Similarly, a candidate for office may under this regulation distribute handbills freely, advertising himself and his qualifications—even though the purpose of such advertising is to get a job from which he will receive his livelihood.

But, if, on the other hand, the business man, already unduly harassed from many sources, seeks to increase his sales by using a circular and thus provide employment to a few more people, he is liable to arrest and punishment under this regulation without regard to whether any littering results therefrom. It should be remembered, that the men who distribute handbills are entirely unskilled workmen and in most cases are not even capable of hard manual labor, so that this type of work is about all they are capable of doing. And while respondent, as a small business man, would only employ 8 or 10 men, if this is multiplied by the thousands of small business men throughout the United States, the number of persons who would be deprived of earning their own livlihood and staying off the relief rolls is substantial.

Petitioner seeks to establish the proposition that every person who desires may give information or opinion upon any social, political, economic, industrial or religious subject to any person on a public street and that

a picket standing before a store, which is involved in a labor dispute may, of constitutional right, deliver handbills requesting the public to refrain from trading with the store; but that if the proprietor stands besides the picket and delivers handbills to the public with a simple solicitation of patronage, such action is totally without the protection of the constitution and may be absolutely prohibited by a municipality. This Court should put an end to such unlawful discrimination.

In the same way the present ordinance discriminates in favor of sample copies of newspapers regularly sold. Such sample copies of newspapers would undoubtedly contain a mixture of purely commercial advertising and information and opinion. If respondent were to print a sample copy of a newspaper in which there was a combination of advertising of the submarine and general news, he would be prohibited from distributing it under this ordinance. The present handbill would, in fact, be quite analogous to such a sample newspaper, if respondent merely inserted the word "Editorial" at the head of his protest against the Dock Department. Such discrimination between what sample copies of newspapers may be distributed is also unreasonable and the ordinance is unconstitutional on this ground.

In *Ex Parte Johns*, 129 Tex. Cr. Rep. 487, 88 S. W. (2d) 709, for example, it was held that an ordinance which prohibited the distribution of advertising matter but exempted newspapers and political advertising was held unconstitutional as discriminatory and denying the equal protection of laws. The court stated:

> "In our opinion, the ordinance is discriminating in that it grants special privileges to those who scatter waste paper, wrapping paper, circulars and handbills carrying advertisements of a political nature, while it denies such privileges to those who by the same means and methods scatter nonpolitical advertisements equally harmless and inoffensive."

Judge Hulbert below in commenting on the discriminatory nature of the ordinance, stated (Petitioner's brief, ap-

pendix, pp. 47-48): "The ordinance is clearly discriminating against the business man while affording protection to persons, distributing non-commercial handbills, whose convictions and efforts might be subversive to the welfare of the government."

(2)

A further objection to the ordinance is that it constitutes a deprivation of respondent's property without due process of law.

This issue was litigated in *In Re Thornburg*, 55 Ohio App. 299, 9 N. E. (2d) 516 involving the Cleveland ordinance. Thornburg was arrested for handing out cards on the sidewalks advertising the pictures he snapped of persons. It was conceded that Thornburg was engaged in a lawful business and the issue was the validity of the ordinance absolutely prohibiting him from handing out the advertising cards. In holding the ordinance unconstitutional as a deprivation of plaintiff's property rights, the court said:

> "Since it is recognized that the right to engage in a lawful business is a property right and that it carries with it the right to appeal to the public for patronage, through bills, circulars, cards, or other advertising matter, it becomes quite apparent that to declare the distribution of such advertising matter, which is an incident of a lawful business, a nuisance as a matter of law, amounts to an infringement of the constitutional provision that the citizen shall not thereby unreasonably, arbitrarily, or without due process of law be deprived of his property."

Another case dealing with such ordinances from the point of view of a deprivation of property is *Cleveland Shopping News Co.* v. *City of Lorain*, 37 Ohio Law Rep. 537. In that case the plaintiff brought an action for an injunction against the City to restrain the enforcement of a city ordinance, prohibiting the circulation of any handbills advertising any commodity for sale. The plaintiff had an established advertising business for the circulation of handbills from

house and the city officials were threatening to arrest the circulators. In holding the ordinance unconstitutional, the court stated:

> "The authorities are clear that the right to conduct a lawful business is property and incident thereto is the right to appeal to the public for patronage;"

If there is a constitutional right to engage in business and personal service, then there must also be a constitutional right to do those things without which the doing of business is impossible. As Judge Brand stated in *Loyear* v. *City of Portland, supra*: "All men whose eyes are open to reality must know that advertising is an essential attribute of the constitutional right to acquire property. The constitutional right to sell one's personal services or goods, without any right to notify the public that goods or services are for sale, would be a mockery."

It should always be remembered that the small business men—the backbone of American business—cannot afford to advertise in newspapers and over the radio. Their only means of reaching the public is through circulars and if this medium is denied them, for no good reason, it will result in a substantial hardship to them. Pleas are being made daily to do something for small business, but New York City only makes their burdens greater.

Conclusion

In summation we submit that Section 318 of the Sanitary Code of The City of New York is invalid and unconstitutional because (1) it unlawfully discriminates between commercial and non-commercial advertising handbills; (2) it is an unreasonable regulation in that it unconditionally prohibits the distribution of all commercial advertising circulars, when littering of the streets can be prevented by other and lawful means; and (3) it is discriminatory against the small business man and constitutes a deprivation of property without due process of law.

Subsequent to 1938, an Oregon Court in *Loyear* v. *City of Portland, supra,* has held squarely in point that an ordinance which unconditionally prohibits the distribution of commercial advertising circulars is unconstitutional; a California Court in *People* v. *Taylor, supra,* held that an ordinance which absolutely prohibited the distribution of a handbill containing a combination of commercial advertising matter and political discussion was unconstitutional; and in the case at bar, Judge Hulbert and Judge Clark, while limiting their decisions to the facts of the case, namely, that the distribution of a handbill containing a combination of advertising and protest could not be suppressed, nevertheless, both made clear in their opinions that they felt that commercial advertising matter could only be regulated and not prohibited.

This, we submit, represents the new law since 1938 and the reasoning found in these opinions should be approved by this Court.

The decree of the Circuit Court of Appeals and of the District Court should be affirmed.

Dated: New York, N. Y. March 5, 1942.

Respectfully submitted,

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